Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
APCC Services, Inc.,	)	File No. EB-05-MD-016
	)	
Complainant,	)	
	)	
v.	)	
	)	
Radiant Telecom, Inc., Intelligent Switching and Software, LLC, and Radiant Holdings, Inc.,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

Adopted: May 15, 2008 **Released: May 20, 2008**

By the Commission:

I. INTRODUCTION

1. This Memorandum Opinion and Order grants in substantial part a formal complaint[1] filed by APCC Services, Inc. ("APCC") against Radiant Telecom, Inc. ("Radiant"), Intelligent Switching and Software, LLC ("ISS"), and Radiant Holdings, Inc. ("Radiant Holdings") (collectively, "Defendants") under section 208 of the Communications Act of 1934, as amended ("Act").[2] APCC alleges that Defendants violated sections 201, 276, and 416 of the Act[3] by failing to comply with Commission payphone rules that impose compensation, call tracking, and other obligations on "Completing Carriers."[4] The principal question presented is whether any of the Defendants is a completing carrier within the meaning of 47 C.F.R. § 64.1300 and the orders implementing that regulation. As explained below, we find that whereas Radiant is a switchless reseller that bears no payment responsibility under our rules, ISS is a Completing Carrier. Because ISS has failed to comply with the payphone compensation rules, we order ISS to pay APCC damages in the amount of $574,073.07, plus interest. Because we grant APCC's claims under section 201(b) of the Act, and such grant will afford APCC all the relief to which it would be entitled under sections 276 and 416(c) of the Act, we dismiss without prejudice APCC's claims under sections 276 and 416(c) of the Act.

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[1] Formal Complaint, File No. EB-05-MD-016 (filed Aug. 2, 2005) ("Complaint").

[2] 47 U.S.C. § 208.

[3] 47 U.S.C. §§ 201, 276, 416.

[4] *See* 47 C.F.R. § 64.1300(a).

II. BACKGROUND

A. Payphone Compensation Regime

2. Section 276(b)(1)(A) of the Act directs the Commission to "establish a per call compensation plan to ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone . . . ."[5] The statute itself does not specify the entity that must pay compensation, but the Commission's orders and rules implementing the statutory directive establish payphone service providers' ("PSPs'") rights to compensation for calls made from their payphones.[6]

3. The Commission's task of establishing a per call compensation plan for coinless payphone calls is complex, for multiple entities may be involved in the transmission of a coinless call.[7] The local exchange carrier ("LEC") serving the payphone transports the call to the switching facilities of an interexchange carrier ("IXC").[8] Although the initial IXC may transport the call to the terminating LEC,[9] often the initial IXC transports the call to a "reseller." The call may then be transported to one or more additional resellers before it is ultimately switched back to an IXC that transports the call to the terminating LEC.[10] In almost all, if not all, such cases, however, one carrier that handles the call will collect money from the ultimate customer, or provide services directly to a switchless reseller that collects money from the ultimate customer, whether that retail end user is a calling card customer or a subscriber to a toll-free number. That carrier will process the call at the mid-point of the call stream, between the IXC that first accepts the call from the originating LEC and the IXC that finally hands the call to the terminating LEC.

4. Some resellers possess the switching equipment required to perform the function of routing the call; other resellers (*i.e*., "switchless resellers") lack such equipment, so they only resell the telecommunications service (*i.e.*, the ability of a customer to place a coinless payphone call), and rely on other carriers to perform the actual switching and transmission functions required to complete the call.[11]

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[5] 47 U.S.C. § 276(b)(1)(A). The Commission has interpreted the statutory term "completed call" to mean "a call that is answered by the called party." *In the Matter of Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Report and Order, 18 FCC Rcd 19975, 19987, ¶ 25 (2003) ("*Tollgate Order*").

[6] *See, e.g., Tollgate Order*, 18 FCC Rcd at 19976, ¶¶ 1-2.

[7] *See, e.g., APCC Services, Inc., Data Net Systems, LLC, Davel Communications, Inc., Jaroth, Inc. d/b/a Pacific Telemanagement Services, and Intera Communications Corp., Complainants, v. Network IP, LLC, and Network Enhanced Telecom, LLP, Defendants*, Memorandum Opinion and Order, 20 FCC Rcd 2073, 2075, ¶ 4 (2005) ("*Network Order*"); Order on Review, 21 FCC Rcd 10488 (2006). "Coin calls" placed from a payphone directly compensate the PSP for use of the payphone and are not involved in the Commission's payphone compensation rules, which pertain to coinless "dial around" calls in which the caller does not directly compensate the payphone operator (*e.g.,* 1-800 and other toll-free calls and calls using access codes to reach a service provider of choice). *See Network Order*, 20 FCC Rcd at 2075, ¶ 4.

[8] *Network Order*, 20 FCC Rcd at 2075, ¶ 5.

[9] *Id*.

[10] *Id*.

[11] *Id*. at 2076, ¶ 6.

Only resellers that possess switching equipment ("switch-based" resellers or SBRs) can physically receive the call and route it onward, either to the LEC serving the call recipient or to the switch of another reseller.[12] Resellers typically do not own transmission facilities, but perform only switching and rely on IXCs to actually transport the call. However, any reseller may sell the underlying telecommunications service to the public, or to a switchless reseller. Such sales often take the form of prepaid calling cards, as they did in this case.[13]

5. The Commission has issued a series of orders addressing which carrier in the call path of a coinless payphone call should compensate the PSP.[14] Prior to the implementation of the current payphone rules, the Commission required the "first underlying facilities-based interexchange carrier to whom the LEC directly delivers the call to compensate the PSP."[15]

6. The Commission revised that approach in the *Tollgate Order*,[16] which placed the compensation obligation on the "Completing Carrier."[17] A "Completing Carrier" is defined as "a long distance carrier or switch-based long distance reseller that completes a coinless access code or subscriber toll-free payphone call or a local exchange carrier that completes a local, coinless access code or subscriber toll-free payphone call."[18]

7. The Commission imposed the compensation obligation on Completing Carriers for two reasons. First, the Commission determined that Completing Carriers "are the primary economic beneficiaries of coinless payphone calls transferred to their switch." That is, the Completing Carrier sells the dial-around service to end-user customers (or provides switching for a switchless reseller who sells to the end-users) and can recover payphone compensation from those customers.[19] Second, the Commission found that, given their position in the call stream, Completing Carriers "possess the most accurate call completion information for such calls."[20]

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[12] *Id*.

[13] *Id.* at ¶ 7.

[14] *See, e.g., First Payphone Compensation Order*, 11 FCC Rcd at 20541 (1996); *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, First Order on Reconsideration, 11 FCC Rcd 21233 (1996); Second Order on Reconsideration, 16 FCC Rcd 8098 (2001) ("*Second Order on Reconsideration*"), *vacated, Sprint Corp. v. FCC*, 315 F.3d 369 (D.C. Cir. 2002) ("*Sprint v. FCC*").

[15] *Second Order on Reconsideration*, 16 FCC Rcd at 8108, ¶ 21.

[16] *See generally Tollgate Order*; Order on Reconsideration, 19 FCC Rcd 21457 (2004) ("*Tollgate Reconsideration Order*") (collectively, "*Tollgate Orders*").

[17] *Tollgate Order*, 18 FCC Rcd at 20018 (Appendix C); *see also* 47 C.F.R. § 64.1300(a).

[18] 47 C.F.R. § 64.1300(a).

[19] *See Tollgate Order*, 18 FCC Rcd at 19988, ¶ 28; *Tollgate Reconsideration Order*, 19 FCC Rcd at 21459, ¶ 3 ("In instances where an SBR completes a call dialed by the SBR's customer from a payphone, the Commission reasoned that the SBR was the primary economic beneficiary because the SBR's customer pays the SBR for the payphone call.").

[20] *Tollgate Order*, 18 FCC Rcd at 19988, ¶¶ 26, 35.

8. The *Tollgate Order* did not alter the obligations of switchless long distance resellers.[21] In the case of switchless long distance resellers, the Commission has recognized since the *First Payphone* Order in 1996 that although they are the primary economic beneficiary for calls made by their customers, they do not have the facilities to track calls.[22] In the interests of lower costs and administrative convenience, the Commission placed the responsibility on the entity with control over the tracking data, the underlying facilities-based long distance carrier, to compensate the PSPs on the switchless reseller's behalf.[23] The underlying facilities-based long distance carrier may recover payphone compensation from its switchless reseller customers.[24]

9. To ensure that Completing Carriers compensate PSPs for each and every completed payphone call,[25] a Completing Carrier must, in addition to paying compensation, also (i) establish a call tracking system that accurately tracks coinless payphone calls to completion;[26] (ii) provide quarterly Completing Carrier reports to PSPs listing the coinless payphone calls completed by the Completing Carrier;[27] and (iii) undergo a call tracking system audit by an independent third party and provide to the Commission and PSPs reports attesting to the accuracy of the system.[28]

10. As an additional measure to ensure that all payphone call activity is traced and accounted for, the Commission's rules also impose requirements on carriers that carry payphone traffic but do not themselves complete those calls. An "Intermediate Carrier" is defined as a "facilities-based long distance carrier that switches payphone calls to other facilities-based long distance carriers."[29] An Intermediate Carrier also must, every quarter, submit a call data report to each PSP that contains certain information about the calls that the Intermediate Carrier switched to other long distance carriers.[30] The quarterly reports provided by Intermediate Carriers are intended to help PSPs ensure that they are getting appropriate compensation from Completing Carriers.

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[21] *Tollgate Order*, 18 FCC Rcd at 19976, ¶ 1 n.1.

[22] *Tollgate Order*, 18 FCC Rcd at 19978, ¶ 7.

[23] *Id.*

[24] *Id.*

[25] As noted, a "completed" call is one that is answered by the called party. Calls that are not answered by the called party are not compensable.

[26] 47 C.F.R. § 64.1310(a)(1).

[27] *Id.* at § 64.1310(a)(4).

[28] *Id.* at § 64.1320(a), (b).

[29] 47 C.F.R. § 64.1310(b).

[30] 47 C.F.R. § 64.1310(c). Each quarterly report must be in computer readable format and include: (1) a list of all facilities-based long distance carriers to which the Intermediate Carrier switched access code and toll-free calls dialed from the PSP's payphone; (2) a list of all access code and toll-free numbers dialed from each PSP's payphones that local exchange carriers delivered to the Intermediate Carrier and the Intermediate Carrier switched to the identified long distance carrier; (3) the total volume of calls switched to each of these numbers; and (4) the name, address, and phone number of the individuals for each identified long distance carrier who serves as the Intermediate Carrier's contact at the identified carrier. *Id*.

B. The Coinless Payphone Calls at Issue

11. Radiant is a calling card provider that issues calling cards in its name and on behalf of other entities.[31] Radiant does not own or lease a switch.[32] ISS is a facilities-based provider that offers calling card processing services and call switching to calling card providers, including Radiant.[33] Radiant Holdings is the parent company of ISS,[34] is not a carrier, and, like Radiant, does not own or lease a switch.[35]

12. The coinless payphone calls at issue here were made by end-user customers with prepaid calling cards issued by Radiant and other calling card providers.[36] The calls took the following path: A LEC routed the call from the payphone to an IXC, which, in turn, routed the call to a switch owned by ISS. The ISS switch and calling card processing platform prompted the caller to provide his or her calling card account number, verified the account number, and then switched the call to another switch, owned by Ntera, which then selected the IXC that offered the lowest cost on that call. Ntera switched the call to that IXC, which, in turn, transferred the call to a LEC for termination at the called party's phone. The ISS switching platform determined whether the call was completed for purposes of billing the caller.[37]

13. APCC is a billing and collections agent for PSPs, including the PSPs on whose behalf APCC brings the Complaint ("represented PSPs").[38] Defendants have not compensated APCC or the represented PSPs for any of the calling card calls delivered from the represented PSPs' payphones to the ISS switch during the third and fourth quarters of 2004.[39] Nor have Defendants provided Completing

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[31] Second Revised Joint Statement of Stipulated Facts, Disputed Facts, and Key Legal Issues, File No. EB-05-MD-016 (filed Aug. 1, 2006) at 6, ¶ 36 ("Second Revised Joint Statement").

[32] *Id.* at 6, ¶ 38.

[33] Second Revised Joint Statement at 5, ¶ 34; 6, ¶ 41. ISS owns the switch it uses in providing these services. *Id.* at 5, ¶ 32.

[34] Second Revised Joint Statement at 2, ¶ 9. FCC filings state that Radiant Holdings is also Radiant's parent company. *See id.* at 2, ¶ 7. Defendants assert, however, that Radiant was spun off from Radiant Holdings in 2003. Revised Answer to Formal Complaint, File No. EB-05-MD-016 (filed Oct. 7, 2005) ("Revised Answer") at 8, ¶ 7. Radiant Holdings changed its name to Ntera Holdings, Inc. on March 23, 2004. Second Revised Joint Statement at 2, ¶ 8.

[35] Second Revised Joint Statement at 5, ¶ 29. On or about November 27, 2006, Defendants sought in Florida state court an Assignment for the Benefit of Creditors of each of the Defendants (which appears to be akin to a Chapter 7 liquidation proceeding under federal bankruptcy laws). *See* Notice Regarding (1) Change of Counsel Law Firm Affiliation, (2) Withdrawal of Counsel, and (3) Assessment of Defendants' Assignment for the Benefit of Creditor Filings, File No. EB-05-MD-016 (filed Jan. 19, 2007) at 2. Defendants' counsel since have withdrawn from the proceeding before the FCC, and no new counsel have entered an appearance in the FCC proceeding. *See* Letter to Albert H. Kramer, Robert F. Aldrich and Jacob S. Farber, counsel for Complainant, and Christopher W. Savage and Michael C. Sloan, counsel for Defendants, from Lia B. Royle, Special Counsel, EB, MDRD, FCC (dated Mar. 5, 2007).

[36] Second Revised Joint Statement at 7, ¶¶ 44, 46, 47.

[37] *Id.* at 5-6, ¶¶ 29-41; 8, ¶ 58; 10, ¶ 77.

[38] Second Revised Joint at 2, ¶¶ 1-3.

[39] *Id.* at 9, ¶ 60; 10, ¶ 79.

Carrier reports or call tracking system audit reports for that period, or otherwise complied with the Commission's "Completing Carrier" rules.[40]

III. DISCUSSION

A. Threshold Defenses

14. We begin by addressing two preliminary legal defenses that Defendants raise. First, Defendants argue that the Complaint should be dismissed because the Commission's rules do not permit class actions.[41] We disagree that APCC's complaint presents a class action case. A class action is a suit brought by "one or more members of a class … as representative parties on behalf of all [members of the class]."[42] APCC's Complaint was not brought by a member of a class, but by an agent (APCC) on behalf of its principals (the represented PSPs).[43] APCC's status as an agent thus distinguishes the cases relied upon by Defendants, in which a member of a class filed the complaint.[44]

15. Next, Defendants argue that APCC does not have standing because it, as opposed to the PSPs it represents, has not been damaged by Defendants' alleged failure to pay payphone compensation.[45] We reject this argument as well. Section 208 of the Act "explicitly confers standing upon 'any person' to complain of alleged wrongdoing by a common carrier, without regard to injury suffered or direct interest in the matter."[46]

B. "Completing Carrier" Analysis

16. This case turns on whether either Radiant or ISS is a "Completing Carrier" within the meaning of our rules and orders. Rule 64.1300(a) defines a "Completing Carrier" as "a long distance carrier or switch-based long distance reseller that completes a coinless . . . payphone call . . . ,"[47] and Rule 64.1300(b) places payment responsibility for dial around calls on "a Completing Carrier that completes a coinless access code or subscriber toll-free payphone call from a switch that the Completing Carrier either owns or leases." Radiant and ISS contend that they are not Completing Carriers because in all cases calls that were handled by ISS's switch were subsequently sent to other carriers that performed switching

[40] *Id.* at 8, ¶¶ 56-57.

[41] Revised Answer at 1, 3 n.7, 4 n.10, 6-7 ¶¶ 1-2.

[42] Fed. R. Civ. P. 23(b).

[43] *See* Second Revised Joint Statement at 2, ¶¶ 1-4; Complaint Ex. 4 (Jaeger Dec'n) at ¶¶ 4-6; Reply at 24-25.

[44] *See* Revised Answer at 1 (citing *Halprin, Temple, Goodman & Sugrue v. MCI Telecomm. Corp.*, Memorandum Opinion and Order, 13 FCC Rcd 22568 (1998) and *Orloff v. Vodafone Airtouch Licenses LLC*, Memorandum Opinion and Order, 17 FCC Rcd 8987 (2002)).

[45] Revised Answer at 2 n.1.

[46] *Philippine Long Distance Tel. Co. v. Int'l Telecom, Ltd.*, Memorandum Opinion and Order, 12 FCC Rcd 15001, 15005, ¶ 9 (1997). *Accord American Message Centers v. Sprint*, Memorandum Opinion and Order, 8 FCC Rcd 5522, 5523, ¶ 6 (1993), *petition for review denied sub nom., AMC v. FCC*, 50 F.3d 35 (D.C. Cir. 1995). *Cf. APCC Services, Inc. v. Sprint Communications Co.*, 418 F.3d 1238, 1242-45 (D.C. Cir. 2005), *vacated and remanded on other grounds*, 127 S. Ct. 2094 (2007) (holding that aggregators (including APCC), acting as assignees for PSPs, had standing to sue in federal district court to recover dial-around compensation for coinless payphone calls).

[47] 47 C.F.R. § 64.1300(a) (emphasis added).

functions. In that event, Radiant and ISS argue, some carrier downstream from them (not specifically identified) is the completing carrier. APCC contends that Radiant and ISS are Completing Carriers because their switch was the platform that performed calling card services and they were the primary economic beneficiaries of the calls, and that is the sense in which the Commission used the term "completing" in the *Tollgate Order*.

17. As an initial matter, Radiant itself is not liable for dial around compensation here. We find that Radiant is a switchless reseller that sold prepaid calling cards used to make some of the coinless payphone calls at issue here. Because it is not a switch-based reseller, Radiant cannot be a Completing Carrier liable for payment under Rule 64.1300(b). We therefore deny the Complaint with respect to Radiant.

18. ISS, by contrast, is a switch-based reseller and serves as the calling card processing platform for coinless calls placed via Radiant calling cards.[48] Thus, ISS stands in the shoes of Radiant for purposes of the Completing Carrier analysis. For the reasons set forth below, we find that ISS is a Completing Carrier and is therefore responsible for compensating PSPs for dial around calls placed from their payphones. ISS's failure to pay the required compensation violated rule 64.1300 and section 201(b) of the Act.

19. Rule 64.1300(a) does not define what it means to "complete" a call – the action that gives rise to payment liability – in the context of a prepaid calling card call. That term has no fixed technical meaning.[49] One possible interpretation, advanced by ISS, is that "completing" a call narrowly means serving as the final switch that directs the call to the terminating LEC. On that interpretation, ISS would not be a Completing Carrier because it does not serve as the last switch in the call chain. But another, broader, interpretation, put forth by APCC, is that "completing" a call means serving as the switch-based card processing platform on which a prepaid card call initially terminates and switching the call toward its ultimate destination. On that broader interpretation, ISS is a Completing Carrier.

20. We agree with APCC that § 64.1300 and *Tollgate Orders* use the term completion in the broader second sense described above. ISS's theory that the final switch before the terminating LEC completes the call is unsustainable on the face of the regulation, which defines a "Completing Carrier" as "a long distance carrier or *switch-based reseller* that completes" a dial-around call. But almost all, if not all, calls are ultimately handled by an IXC that not only transports the call but also necessarily performs some switching in order to route the call to the terminating LEC. If ISS were correct that "Completing Carrier" meant the last carrier to switch the call, an SBR would *never* be a Completing Carrier. ISS's interpretation would render the regulation's reference to switch based resellers meaningless. ISS's interpretation would also result in the unfair placement of payment liability on IXCs that did not, and could not, collect dial-around fees from the person that initiates the call.

21. That understanding is implicit in the *Tollgate Order*, which promulgated § 64.1300 and against which the regulation must be read. The *Tollgate Order* was premised on the idea of a three-part call chain in which an initial IXC carried the call from the originating LEC to the facilities of an SBR –

[48] Revised Answer at 8 ¶ 6 ("ISS operates a hardware and software calling card platform that is used to provide service to Radiant and other calling card providers.") & 35 (describing "calling card/switching platforms operated by ISS").

[49] We have used "complete" to mean answered by the called party, but that is obviously not the sense of the word as used in § 64.1300. The "Completing Carrier" switches the call to "completion" whether or not it is answered by the called party.

the Completing Carrier – that could bill a customer (or in the case of an SBR like ISS that performed switching services for the billing switchless reseller) and that subsequently switched the call toward its final destination. The Completing Carrier was the middle link between the two legs of the call chain, even though multiple carriers might be involved in either leg. This is clear from the *Tollgate Order*'s extensive discussion about the Completing Carrier being the primary economic beneficiary of the call. The SBR that is the Completing Carrier, the Commission found, has "customers [that] use payphones in order to use the SBR's services to complete a call, whether it is a simple 800 number, a calling card, or a prepaid calling card. In other words, the PSPs provide services to the SBRs so that the SBRs can render services to their SBR customers. The SBR should be liable to pay for services rendered by its service providers."[50] That description applies precisely to Radiant, which sold calling cards to customers and used ISS to perform its switching and billing services.[51] "Completing Carrier" as used in the *Tollgate Order* did not refer to the last carrier to switch a call, but to the SBR that ultimately provided service to and collected money from the customer and thus was the primary economic beneficiary of the call. Here, that carrier is Radiant, and because ISS provides the relevant facilities-based services for Radiant, ISS is the Completing Carrier. It is no surprise that ISS in fact subtracted from the calling card accounts 28 cents per call to cover "FCC Mandated" "Payphone Charges."[52] As we stated in paragraph 3 of the *Tollgate Reconsideration Order*, the Completing Carrier SBR is "the primary economic beneficiary [of a coinless call] because the SBR's customer pays the SBR for the payphone call." No other carrier in the call chain subsequent to ISS would have had an opportunity to collect dial-around compensation payments from a customer.

22. The *Tollgate Order* also defined "Completing Carrier" as "the carrier best able to determine whether a payphone originated call directed to a SBR switch has been answered by the called party."[53] The Commission contrasted a Completing Carrier with other carriers in the call stream: an IXC "can track when the … call begins and ends, but has no way of discerning: (1) whether the call it delivers is only on the first leg of the call from the end-user's location; and (2) whether the call is launched and answered as an end-to-end completed call."[54] The Commission thus clearly contemplated that the Completing Carrier would *not* necessarily be the first or last carrier to switch a call, but rather the carrier in the call path with access to information about both legs of the call – *i.e.*, the carrier that operates the "platform" on which call information is collected and processed.[55] Again, ISS fits that description to a tee.

23. Consistent with that understanding, the *Tollgate Order* refers repeatedly to the Commission's intent to place payment liability on the carrier that owns the "platform" from which calls are "completed." For example, the *Tollgate Order* refers at paragraph 1 to payment for "Payphone-originated calls that are completed on [a] facilities-based long distance carrier's platform." Paragraph 43, discussing SBR audit reports, requires the SBR to send the report "to all PSPs for which the SBR

[50] *Tollgate Order*, 18 FCC Rcd at 19989, ¶ 29.

[51] *See* Second Revised Joint Statement at 14 ¶ 104 ("There are three functions involved in a prepaid dial-around call: (1) the originating IXC function; (2) the platform process/switching function; and (3) the terminating IXC function whereby the call is transported to the terminating LEC.")

[52] *See* Second Revised Joint Statement of Stipulated Facts at 7 ¶43.

[53] *Tollgate Order*, 18 FCC Rcd at 19992, ¶ 35.

[54] *Id*.

[55] *Id*.

completes payphone calls on its platform." Paragraph 36 states that the compensation must be paid by "the SBR on whose platform the coinless payphone call terminates." Paragraph 19 refers to the situation under the prior rule, where "PSPs lacked the information necessary to identify the origins of the calls switched to a SBR's platform." As mentioned above, ISS operates a platform on which calling card calls initially terminate and from which the calls are sent to their destinations for completion. Downstream IXCs do not operate such platforms.

24. ISS nevertheless claims that the Commission intended to place liability on the last carrier to switch a call to the terminating LEC. It relies on several points in the *Tollgate Reconsideration Order* in which the Commission stated (in various formulations) that "the last facilities-based long distance carrier in the call path that completes the call" must pay dial around compensation.[56] That reliance is misplaced for several reasons. First, the snippets relied on by ISS do not establish a strict last-switch approach. Statements placing liability on the last-switch-based carrier *that completes the call* simply beg the question of what it means to complete a call. As shown above, completing a call as used in the *Tollgate Order* means processing it at a platform and routing it toward its final destination, not simply being the last switch in the call chain. References to the "last switch" were plainly meant to distinguish the rules established in the *Tollgate Order* from the prior rules, which placed liability on the first switch-based carrier. Second, even if the statements relied on by ISS did suggest a strict last-switch approach, three or four isolated fragments could not contradict the entire analytical framework of the *Tollgate Order* and the far more numerous references to calls being completed on a processing platform, as discussed above.

25. It is of no moment that ISS does not, as it claims, receive call answer supervision information. One of the fundamental responsibilities placed upon the Completing Carrier was to implement a call tracking system that was audited and certified. As part of fulfilling that responsibility, ISS was required to arrange to have access to answer supervision supplied by downstream IXCs. ISS failed to do so, and it may not now turn its regulatory default into an affirmative defense.

26. Neither is ISS an "Intermediate Carrier" within the meaning of our rules. Rule 64.1310(b) defines an intermediate carrier as "a facilities-based long distance carrier that switches payphone calls to other facilities-based long distance carriers."[57] Because the category of Intermediate Carriers is mutually exclusive with that of Completing Carriers – one cannot be both with respect to the same call – the definition of Intermediate Carrier must be read to include an implied exception for Completing Carriers that switch a call to another carrier.[58] Any other reading would result in the strict last-switch rule that we have shown above was not the rule we intended to adopt. We note that although ISS claims to be an Intermediate Carrier, it in fact filed no Intermediate Carrier reports, as required by § 64.1310(c). To the contrary, ISS has in the past paid dial-around compensation to PSPs.[59]

[56] Letter to Marlene H. Dortch, Secretary, FCC, from Christopher W. Savage and Michael C. Sloan, counsel for Defendants (dated Sept. 12, 2006) at 1-2 (citing *Tollgate Reconsideration Order*, 19 FCC Rcd at 21463, ¶¶ 2, 3, 12 (emphasis added)).

[57] 47 C.F.R. § 64.1310(b).

[58] Indeed, although we need not decide the matter in this case, it would seem that the most logical understanding of Intermediate Carrier would be those carriers that switch a call to a Completing Carrier, but not those coming later in the call stream. Once the Intermediate Carriers have notified the PSP of the Completing Carrier responsible for payment and call tracking, the PSP has no significant need to know what carriers subsequent to the Completing Carrier were involved in switching the call to termination.

[59] *See* Second Revised Joint Statement at 3-4.

27. In sum, we find that Radiant and the other calling card providers are switchless resellers that contracted with ISS, a facilities-based carrier, to complete payphone calls on their behalf. As such, for purposes of our payphone compensation rules, ISS was the "Completing Carrier" within the meaning of rule 64.1300(a) for the payphone calls at issue.[60]

C. Damages

28. Because ISS is a Completing Carrier, it is required to pay compensation for every call completed during the third and fourth quarters of 2004. APCC argues that ISS should be liable for *all* calls delivered from the represented PSPs' payphones to ISS's switch, regardless of whether they were in fact completed.[61] APCC notes that ISS violated Commission rules obligating Completing Carriers to track calls to completion, and that, as a result, it is not possible to determine the actual number of completed calls.[62] Thus, APCC argues, "It is entirely appropriate to make the violator, rather than the innocent PSP, bear any loss from any 'overpayments'…."[63] In contrast, ISS proposes that we apply a proxy to ascertain the number of completed calls. Specifically, ISS debits end users' accounts for calls lasting 30 seconds or longer,[64] and ISS contends that only these calls are "completed."[65]

29. We decline to accept either party's proposal and, *based on the limited record in this case*, adopt a middle view. APCC's proposal of compensation for all calls regardless of whether they are actually completed would contravene section's 276 directive that compensation be paid only for "*completed* intrastate and interstate call[s]."[66] In our view, it is implausible that every call delivered to ISS during the six months at issue was actually completed. We also believe that application of ISS's 30-second proxy under these circumstances, however, similarly would violate section 276. Clearly, application of the 30 second proxy as proposed would exclude any completed call that lasted fewer than 30 seconds. Moreover, ISS developed and understands the financial consequences of the 30-second proxy. In contrast, the represented PSPs did not have input into the proxy's development, nor could they be aware of its financial consequences. Use of the proxy here, then, would be tantamount to permitting ISS's unilateral negotiation of a reimbursement amount that does not reflect payment for *each and every* completed call to the represented PSPs as required under Section 276.

30. Because the Defendants failed to comply with the Commission's call tracking rules, we cannot ascertain the exact number of calls for which ISS is liable. Consequently, in order to ensure that the represented PSPs are adequately compensated, we believe it is appropriate to hold ISS liable not only for calls delivered from the represented PSPs payphones to ISS's switch lasting more than 30 seconds, but also for a significant portion of those calls lasting less than thirty seconds. Accordingly, we find that 1,031,667 of the calls delivered to ISS's platform during the third quarter of 2004, and 660,876 of the

[60] We deny APCC's Motion to Strike Portions of Revised Answer, File No. EB-05-MD-016 (filed Oct. 20, 2005), because our disposition of the Complaint renders the issues in that motion moot.

[61] Complaint at 28-29, ¶¶ 78-80; Reply at 32-25, ¶¶ 54-61.

[62] Complaint at 28, ¶ 78; Reply at 34, ¶¶ 59-60.

[63] Reply at 33, ¶ 57.

[64] Second Revised Joint Statement at 8, ¶ 55; Answer Exh. 1 (Asad Decl.) at ¶ 7, Exh. 6 (Yelutas Decl.) at ¶ 8.

[65] Second Revised Joint Statement at 22-23, ¶ 171.

[66] 47 U.S.C. § 276(b)(1) (emphasis added).

calls delivered during the fourth quarter of 2004, were completed.[67] In this way, we endeavor to ensure that the represented PSPs collect the monies they are owed and that ISS is not unjustly enriched. We believe that the result reached here – although not perfect – more accurately represents the number of calls that were, in fact, completed. We emphasize that this course is the result of ISS's willful failure to comply with the rules that, when followed by Completing Carriers, ensure that the mandates of Section 276 are achieved.[68]

31. Finally, we remind Completing Carriers that, in addition to section 208 complaint proceedings, any Completing Carrier that violates the Commission's call tracking rules can be found liable pursuant to section 503 of the Act, which provides for forfeitures against "[a]ny person who is determined by the Commission … to have … willfully or repeatedly failed to comply with any… order issued by the Commission under this Act …."[69]

32. Defendants contend that the default rate for the fourth quarter of 2004 should be computed at the $.24 per call default rate rather than the $.494 per call default rate subsequently established in the 2004 *Rate Increase Order*.[70] Defendants rely on the fact that the increase in the default rate from $0.24 to $0.494 was not properly reflected in the Federal Register.[71] We disagree. Regulations must be read in

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[67] ISS admits that the represented PSPs delivered 1,618,044 calls to ISS's platform in the third quarter of 2004, of which 445,290 calls were completed using ISS's thirty-second proxy, and that the represented PSPs delivered 1,132,857 calls to ISS's platform in the fourth quarter of 2004, of which 188,896 calls were completed using ISS's thirty-second proxy. Second Revised Joint Statement at 22, ¶¶ 171-72. Adding to the number of calls lasting 30 seconds or longer the number of calls mid-way between the parties' respective proffered numbers, we conclude that 1,031,667 of the calls delivered to ISS's platform during the third quarter of 2004 (*i.e.*, 445,290 + .5(1,618,044-445,290)), and 660,876 of the calls delivered during the fourth quarter of 2004 (*i.e.*, 188,896 + .5(1,132,857-188,896)), were completed.

[68] The Commission has discretion to conduct proceedings "in such manner as will best conduce to the proper dispatch of business and to the ends of justice," 47 U.S.C. § 154(j), and is obligated to award damages to which the complainant is entitled. 47 U.S.C. § 209. *See APCC Services, Inc. v. TS Interactive, Inc.*, Memorandum Opinion and Order, 19 FCC Rcd 10456, 10462, ¶ 16 (Enf. Bur. 2004) (where the record contains no call-detail records or other evidence establishing the number of calls actually completed, payphone compensation may be awarded based upon a "reasonable" estimation of call completion rates).

[69] 47 U.S.C. § 503(b)(1)(B).

[70] *Request to Update Default Compensation Rate for Dial-Around Calls from Payphones*, Report and Order, 19 FCC Rcd 15636 (2004) ("*Rate Increase Order*"). *See* Answer at 37-42.

[71] Answer at 40-41. In the *Rate Increase Order*, the Commission raised the default per-call compensation rate from $.24 to $.494. Therefore, rule 64.1300 as published in the *Federal Register* should have been revised at section (d) to state, "the carrier is obligated to compensate the [PSP] at a per-call rate of $.494." Instead, the *Federal Register* stated as follows:

> (b) Except as provided herein, a Completing Carrier … shall compensate the [PSP] for that [dial-around] call at a rate agreed upon by the parties by contract.
>
> (c) In the absence of an agreement as required by paragraph a [*sic*] of this section, the carrier is obligated to compensate the PSP at a per-call rate of $.494.
>
> (d) In the absence of an agreement as required by paragraph b of this section, the carrier is obligated to compensate the PSP at a per-call rate of $.24.

(continued…)

conjunction with all relevant promulgating orders.[72] Thus, rule 64.1300 should be read in conjunction with the *Rate Increase Order,* which clearly and repeatedly stated that the per-call compensation rate for dial-around calls was to be raised from \$.24 per call to \$.494 per call.[73] Moreover, it is "axiomatic that any regulation should be construed to effectuate the intent of the acting body."[74] The Commission clearly intended to raise the per-call compensation rate to \$.494 per call; therefore rule 64.1300 must be construed so to state.[75] Finally, Defendants were not confused or misled by the error in the *Federal Register*. On the contrary, Defendants discuss at length the fact that the initial dial-around rate was \$.24, that the *Rate Increase Order* increased that rate to \$.494, that the *Federal Register* should have been revised at subsection "d" to reflect this increase, and that it did not do so.[76] Accordingly, the error is harmless, and Defendants' argument to the contrary lacks merit.[77] We therefore multiply the third quarter number of calls by \$.24 and the fourth quarter 2004 calls by \$.494, resulting in damages of \$574,073.07.

33. In a similar vein, APCC requests that we award punitive damages against Defendants.[78] Assuming, without deciding, that we have authority to award punitive damages, the facts here do not justify any such award because APCC has not shown that Defendants acted "'maliciously, wantonly or

(Continued from previous page)
This error has been corrected. *Request to Update Default Compensation Rate for Dial-Around Calls from Payphones*, Erratum, 20 FCC Rcd 20231 (2005).

[72] Thus, for example, the United States Supreme Court upheld the Commission's rule obligating incumbent LECs to combine network elements, 47 C.F.R. § 315(c)-(d), on the basis of a limitation expressed not in the rule itself, but rather in the text of the order promulgating that rule. *Verizon Communications Inc. v. FCC*, 535 U.S. 467, 535-39 (2002) (citing *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd. 15499, 15648 ¶ 294 (1996) (subsequent history omitted)). *See United States Telecom Ass'n v. FCC*, 400 F.3d 29, 38 (D.C. Cir. 2005) (finding that Commission rule 52.21, 47 C.F.R. § 52.21, does not obligate wireline carriers to provide location portability because the promulgating order so states) (citing *Telephone Number Portability*, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 8352, 8356, ¶ 6 (1996); *Wyoming Outdoor Council v. USFS*, 165 F.3d 43, 53 (D.C. Cir. 1998) (reviewing a regulation's preamble as "evidence concerning contemporaneous agency intent"); *New York State Comm'n on Cable Television v. FCC*, 571 F.2d 95, 97-98 (2d Cir. 1978) (construing Commission rule 76.31(b), 47 C.F.R. § 76.31(b), in light of the order promulgating that rule).

[73] *See Rate Increase Order*, 19 FCC Rcd at 15665, ¶ 92 ("[W]e find that…it is appropriate to prescribe an increased default dial-around compensation rate of \$.494 per call"); *id.* at 15637, 15661, ¶¶ 1, 80.

[74] *United States v. Miller*, 303 F.2d 703, 707 (9th Cir. 1962). *Accord United States v. Eastern of New Jersey, Inc.*, 770 F. Supp. 964, 976 (D. N.J. 1991); *United States v. Unitank Terminal Serv.*, 724 F. Supp. 1158, 1165 (E.D. Pa. 1989); *Harnischfeger Corp. v. EPA*, 515 F. Supp. 1310, 1314 (E.D. Wisc. 1981); *Diaz v. INS*, 648 F. Supp. 638, 644 (E.D. Cal. 1986).

[75] Relying on *Lal v. INS*, 255 F.3d 998, 1004 (9th Cir. 1999), Defendants argue that "an agency's regulations, as published in the *Federal Register*, take precedence over the text of a conflicting agency order." Answer at 41. *Lal* stands for no such proposition. The "conflicting agency order" in *Lal* was an appeal board's subsequent interpretation of an existing rule, not, as here, an agency order that promulgates, and explains, a revised rule.

[76] *See e.g.,* Answer at 4 (admitting that "the Commission may have intended to raise that rate from \$0.24 to \$0.494 per call," and citing the *Rate Increase Order*), Answer at 31-33, 38.

[77] *See United States Telecom Ass'n*, 400 F.3d at 41 (mislabeling a notice of proposed rulemaking as a request for comments on a petition for declaratory rulemaking was not fatal where the error was "plainly harmless").

[78] Complaint at 31-35, ¶¶ 85-96.

with a recklessness that betokens improper motive or vindictiveness.'"[79]

34. Finally, we address the issue of the appropriate interest rate. The Commission has determined that, for the period at issue, unpaid dial-around compensation accrues interest at the rate of 11.25% per year.[80] Under payphone industry practice, compensation for a dial-around call is due on the first day of the quarter that is one quarter after the one in which the billed call was made.[81] Accordingly, prejudgment interest begins to accrue on the day compensation is due.[82] Defendants argue that interest should be waived, or that the rate should be set in accordance with the statutory rate provided in 28 U.S.C. § 1961 because Defendants "had a solid legal basis for believing that no payments were due at all."[83] As discussed, however, the Commission has expressly stated that unpaid dial-around compensation shall accrue interest at the rate of 11.25% per year. Defendants' asserted misunderstanding of the law cannot set aside a Commission rule in these circumstances.

IV. ORDERING CLAUSES

35. Accordingly, IT IS ORDERED, pursuant to sections 1, 4(i), 4(j), 201, and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201, and 208, and sections 1.720-1.736 and 64.1300-64.1320 of the Commission's rules, 47 C.F.R. §§ 1.720-1.736, 64.1300-64.1320, that APCC Services, Inc.'s claims against Intelligent Switching and Software, LLC under section 201(b) of the Act are GRANTED to the extent indicated herein.

36. IT IS FURTHER ORDERED, pursuant to sections 1, 4(i), 4(j), 208, 276, and 416 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 208, 276, and 416, and sections 1.720-1.736 and 64.1300-64.1320 of the Commission's rules, 47 C.F.R. §§ 1.720-1.736, 64.1300-64.1320, that APCC Services, Inc.'s claims against Intelligent Switching and Software, LLC under sections 276 and 416 of the Act are DISMISSED WITHOUT PREJUDICE.

37. IT IS FURTHER ORDERED, pursuant to sections 1, 4(i), 4(j), 201, 208, 276, and 416 of

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[79] *Halprin, Temple, Goodman, & Sugrue v. MCI Telecomm. Corp.*, 13 FCC Rcd 22568, 22582, ¶ 31 (1998) (citing *Strouth v. Western Union Telegraph Co.*, Initial Decision, 70 FCC 2d 525 (1977), *aff'd in relevant part*, 70 FCC 2d 506 (Rev. Bd. 1978)).

[80] *See, e.g.*, *APCC Services, Inc. v. NetworkIP, LLC and Network Enhanced Services, LLP*, Memorandum Opinion and Order, 22 FCC Rcd 4286, 4291-92, ¶ 11 (2007) ("*APCC v. NetworkIP*"); *Request to Update Default Compensation Rate for Dial-Around Calls from Payphones*, Report and Order, 19 FCC Rcd 15636, 15661, ¶ 79 (2004); *Bell Atlantic – Delaware, Inc. v. Frontier Communications Services, Inc.*, Memorandum Opinion and Order, 16 FCC Rcd 8112, 8115, ¶ 17 & n.43 (2001); *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Third Report and Order, and Order on Reconsideration of the Second Report and Order, 14 FCC Rcd 2545, 2630-31, ¶ 189 (1999); *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Second Report and Order, 13 FCC Rcd 1778, 1805-06, ¶¶ 59-60 (1997) (some subsequent history omitted).

[81] *APCC v. NetworkIP*, 22 FCC Rcd at 4292, ¶ 11.

[82] *See, e.g.*, *id.; Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Fifth Order on Reconsideration and Order on Remand, 17 FCC Rcd 21274, 21308, ¶ 101 (2002); *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, AT&T Request for Limited Waiver of the Per-call Compensation Obligation, 13 FCC Rcd 10893, 10895, ¶ 3 (1998).

[83] Answer at 46, ¶ 81; *id*. at 57, ¶ 128.

the Act, 47 U.S.C. §§ 151, 154(i), 154(j), 201, 208, 276, and 416, and sections 1.720-1.736 and 64.1300-64.1320 of the Commission's rules, 47 C.F.R. §§ 1.720-1.736, 64.1300-64.1320, that APCC Services, Inc.'s claims against Radiant Telecom, Inc. and Radiant Holdings, Inc. are DENIED.

38. IT IS FURTHER ORDERED, pursuant to sections 1, 4(i), 4(j), 201, 208, and 209 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201, 208, and 209, and sections 1.720-1.736 and 64.1300-64.1320 of the Commission's rules, 47 C.F.R. §§ 1.720-1.736, 64.1300-64.1320, that, within 90 days of the release of this Order, Intelligent Switching and Software, LLC shall pay APCC Services, Inc. damages in the amount of $574,073.07, together with interest on such damages at the rate of 11.25%, accruing on the first day of the quarter that is one quarter after the one in which the billed call was made.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary